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From: CN=Ross Geredien/OU=DC/O=USEPA/C=US

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Daily News

Rare Tort Ruling Stresses Difficulties In Proving Fracking's Harmful Effects

Posted: June 5, 2012

A rare ruling by a state judge dismissing toxic tort litigation against natural gas drillers highlights the uphill battle landowners -- and EPA -- face in trying to show that hydraulic fracturing causes adverse effects, while also encouraging industry to ask courts to require plaintiffs early on in the suit to prove a link between fracking and health impacts.

Colorado state Judge Ann B. Frick May 9 ruled to dismiss a tort suit, William G. Strudley et al v. Antero Resources Corporation et al, in which residents living near Silt, CO, drilling sites were seeking findings of

negligence, trespass, nuisance, strict liability and other claims.

Frick, a judge on the District Court for the City and County of Denver, Colorado, found that the plaintiffs were unable to make a prima facie showing that exposure to air and water contaminated with chemical releases from fracking caused adverse health effects.

"Though the evidence shows existence of certain gases and compounds in both the air and water of Plaintiffs' Silt home, there is neither sufficient data nor expert analysis stating with any level of probability that a causal connection does in fact exist between Plaintiffs' injuries and Plaintiffs' exposure to Defendants drilling activities," she wrote in the May 9 order.

The ruling represents one of the first in a toxic tort claim involving fracking, given that a majority of these types of cases have resulted in settlements.

But the decision could pose problems for residents that may be harmed by fracking operations. As massive booms in oil and natural gas production continue to spark public concerns over health and environmental impacts of the practice, particularly potential contamination of groundwater resources, a wave of toxic tort litigation has swept through the courts.

And because lawsuits over alleged contamination from fracking and other aspects of drilling have emerged as a major trend in environmental torts litigation, following a similar pattern of suits over methyl tertiary butyl ether, some predicted that the threat of hefty damage claims might be enough to push industry toward accepting federal regulation. In some of those cases, plaintiffs are backed by major law firms and environmental groups seeking precedential rulings to highlight contamination and health risks associated with fracking.

Frick's order highlighted the difficulties in showing a causal link between human health effects and environmental releases from fracking -- a necessary bar for winning a tort claim but an issue which EPA has also been struggling to address because the exposure pathways are notoriously unclear. Causation, which refers to an evidence-based link between defendant conduct and a resulting adverse effect suffered by the plaintiff, is a key element underlying most tort claims, but can be one of the most difficult to show in environmental suits.

For example, EPA's draft findings that fracking fluids contaminated an aquifer in Pavillion, WY, have been repeatedly shredded by industry and states because the agency did not delineate a pathway for which fracking fluids could have upwardly migrated through a rock formation into more shallow drinking water.

The Colorado court also backed the Colorado Oil & Gas Conservation Commission's findings that Antero's fracking activities near Silt had not led to groundwater contamination.

Tort Litigation

A legal source says other state courts in environmental tort litigation are likely to side with findings in state investigations. But that could be significant for fracking litigation, where state agencies have in high-profile cases opposed EPA data indicating groundwater pollution may have occurred through fracking, including Parker County, TX, where EPA alleged that Range Resource's operations caused methane contamination in nearby drinking water wells. A related torts lawsuit is pending, although EPA earlier this year dropped its controversial Safe Drinking Water Act enforcement order against the company.

However, the Colorado ruling is also significant, legal and industry sources say, because the court based its dismissal on the plaintiffs' failure to comply with a modified case management order (MCMO), which industry had previously asked the court to enter.

Also known as a Lone Pine order, named after a 1986 New Jersey ruling, *Lore v. Lone Pine Corp.*, an MCMO requires plaintiffs to produce credible expert evidence at the start of the case to establish that they can support at least some elements of causation before the case moves into the more costly pre-trial discovery phase.

"What Lone Pine does is front-end the obligation that plaintiffs show causation . . . it says, if you can't get past first base, why should the defense spend millions of dollars only to have the court find out at the very end the lawsuit is frivolous," the legal source says.

Hogan Lovells, an industry firm, says in a May 11 press release that "the legal victory is significant" because use of the Lone Pine order saved all parties time and money by requesting evidence of harm be presented early in the proceedings.

In a May 16 Toxic Tort Litigation Blog post, William Ruskin, of the firm Epstein Becker & Green, suggests that all similar fracking litigation be "tested" by Lone Pine. "The alternative is to subject oil and gas industry defendants nationwide to the burden of defending frivolous spare-no-expense WTC Disaster Site-style litigations," which can go on for years, Ruskin writes. "Better for the courts and all the litigants if causation evidence must be demonstrated at the outset of the case rather than at the tail end."

While some courts have been reluctant to consider Lone Pine orders, Frick's ruling may encourage industry defendants in fracking litigation to seek a similar avenue, given the difficulties in showing causation.

"Cognizant of the significant discovery and cost burdens presented by a case of this nature, the Court endeavored to invoke a more efficient procedure than that set out in the standard case management order," Frick wrote in the order. "Accordingly, the Court required Plaintiffs, before full discovery and other procedures were allowed, to make a prima facie showing of exposure and causation, as described in more detail below."

Drilling Activities

The suit alleged that Antero and other companies operating drilling activities near their former Silt, CO, residence were responsible for air and water contamination contributing to a host of health problems, including eye ailments, rashes, nosebleeds and blackouts.

The court's MCMO required that the plaintiffs produce affidavits or other evidence identifying each hazardous substance released

from the fracking operations, explaining how it is causally linked to each health ailment, the dose or another quantitative measurement of the concentration, the precise location of any exposure, a diagnosis of a specific medical condition or illness and a conclusion that the illness was caused by the exposure and not independent factors.

In the May 9 order granting dismissal, Frick writes that the plaintiffs in the suit could only "vaguely describe" their ailments as "health injuries" from exposure to contaminated water and air polluted with drilling chemicals, including hydrogen sulfide, toluene, propane, isobutene and other toxic hydrocarbons.

But the plaintiffs were unable to produce evidence beyond testimony from an environmental health expert that "sufficient environmental and health information exists to merit further substantive discovery," the judge noted in her order, pointing out that the witness could not opine as to whether exposure was a contributing factor to any of the alleged health effects. "Plaintiffs' requested march towards discovery without some adequate proof of causation of injury is precisely what the MCMO was meant to curtail," the order says.

The judge's order also noted that while the plaintiffs in Strudley were able to produce "voluminous" amount of data -- far more than the plaintiff in Lone Pine were able to provide -- the same "adequacy issues" exist in both cases. -- Bridget

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